MOIZ TAHIR ALI TAHIR ALI

v.

CK PATEL TRADING SDN BHD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING SUMMONS NO: 24-1592-2002]
10 SEPTEMBER 2003

CIVIL PROCEDURE: *Judgment - Summary judgment - Setting aside - Application made five years later - Applicant relying on case decided subsequent to summary judgment for setting aside - Whether application sustainable*

CIVIL PROCEDURE: *Costs - Solicitor, whether should be ordered to pay costs of application*

The plaintiff and his partner in business were sued by the defendant for the unpaid price of goods supplied to them. The defendant obtained a summary judgment against the plaintiff and a judgment in default of appearance against the plaintiff's partner. The plaintiff appealed to the judge in chambers to set aside the summary judgment against him and the learned judge allowed the appeal but by substitution ordered a summary judgment for a reduced sum ('the said judgment'). Pursuant to the said judgment, bankruptcy proceedings had been taken against the plaintiff. About five years later, the plaintiff brought the application herein to set aside the said judgment on the basis that the case of *Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors*, if referred to, would have resulted in judgment in his favour. In that case, it was held that judgment against one joint contractor or tortfeasor was a bar to proceedings against others.

Held:

[1] Since the plaintiff was applying to set aside a validly obtained judgment almost five years later, the plaintiff ought to have applied for leave of the court. The reason being that the application ought to have been made within thirty days after receipt of the order by him (Rules of the High Court 1980, O. 42 r. 13). (p 607 a)

[2] This application, if granted, would be against public policy and contrary to the principle that there must be finality to any issue. In other words, each time the law develops, a litigant will be entitled to re-open his case and re-argue it either based on the amendment to the earlier law on which the judgment he is applying to set aside is founded or pursuant to case law. (p 607 b)

[3] The plaintiff intended to rely on a subsequent judgment that would now vindicate him. It could be asked against the plaintiff that his counsel who argued his case in 1998, should have diligently researched the law and presented a similar argument to that in the *Asia Commercial* case. Since solicitors can themselves be open to suits in negligence, public policy demands that there be finality to an issue. (p 607 e-f)

[4] The plaintiff had exhausted all attempts when he was sued in the earlier case. He had failed to appeal against the decision that he was now attempting to set aside almost five years later. Since the only issue raised by the plaintiff was his reliance on the *Asia Commercial* case, there was no other explanation from the plaintiff for this inordinate and extensive delay. (p 607 g)

[5] Whilst judgment in default of appearance was entered against the plaintiff's business partner, the plaintiff who was the 2nd defendant in the earlier case had resisted the summary judgment application and succeeded in the appeal although judgment was entered for a reduced sum. The plaintiff surely had waived all his further rights by arguing the appeal, without raising the issue he was now raising before this court. (p 608 a-b)

[6] The *Asia Commercial* case resolved between a borrower and the guarantor. The guarantor is deemed to have waived his common law rights by signing off in the agreement his protective rights. In the present case, being partners in business, the plaintiff and his partner were both jointly and severally liable to the defendant. (p 608 c)

[7] If a solicitor lured by the temptation of a fat fee is prepared to conjure up a defence or a claim and fails miserably in the attempt, then the solicitor should be made to pay costs. In the present case, since the judgment relied upon by the plaintiff was delivered recently and had not gone through the portals of the Court of Appeal, the plaintiff's counsel should not be made to pay costs personally. (p 608 f-g)

[Application dismissed.]

Case(s) referred to:
Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors [2002] 2 CLJ 741 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 13

For the plaintiff - K Periasamy; M/s Zubeda & Amarjeet
For the defendant - KT Rajah Naidu (Teja Singh Penesar); M/s KT Rajah Naidu & Partners

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The plaintiff, Moiz Tahir Ali ("Moiz") together with another person known as Asgar Ali bin Fakhruddin Kegdi ('Ali') carried on the partnership business known as Mohamedi Textiles ("the partnership"). The defendant had a claim for the unpaid price for the goods supplied to the partnership. The defendant pursued his claim by taking legal action jointly against Moiz and Ali, for monetary judgment as the joint-contractors being the then partners of the said partnership.

The defendant's legal action was filed in the Penang High Court. On 15 May 1997, the defendant (the plaintiff in the said suit) obtained a judgment in default of appearance against Ali who was named as the 1st defendant in the said suit. Moiz who was named as the 2nd defendant resisted the said suit and O. 14 proceedings were taken against him. Summary judgment was granted by the senior assistant registrar against Moiz. Moiz then filed a notice of appeal to the judge in chambers in the said suit against the said summary judgment. The learned judge allowed the appeal and set aside the summary judgment dated 22 August 1997 but by substitution ordered on 16 December 1998, a summary judgment for a reduced sum ("the said judgment") . There was no further appeal in respect of the said judgment but on 8 March 1999 an application was made by Moiz to set-aside the said judgment on the following basis:

a i) that the statement of claim was made and dated prior to the date of the commencement of the said suit;

ii) that the facts pleaded in the statement of claim could not be supported on evidence;

b iii) that the period for which interest was claimed as pronounced in the said judgment differed from the averments in the statement of claim.

Moiz's said application to set aside the said judgment was dismissed and there was no further appeal against that dismissal. Pursuant to the said judgment bankruptcy proceedings have been taken against Moiz in the Alor Setar High Court.

Findings Of The Court

The plaintiff's present case is based squarely upon my judgment in *Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741. It is therefore necessary to look into the facts of *Asia Commercial*.

In that case the plaintiff obtained final judgment against the 1st and 3rd defendants and subsequently against the 4th defendant. The said judgment was obtained in relation to a loan taken by the 1st defendant with the plaintiff. The 2nd, 3rd and 4th defendants were the guarantors. The 2nd defendant applied to have the action against him dismissed on the ground that as final judgment had been entered against the 1st and 3rd defendants on a joint basis, the cause of action against him had been merged in the said judgment, and pleaded that the plaintiff was, therefore, estopped from proceeding with the action against him. I held therein that judgment against one joint contractor or tortfeasor is a bar to proceedings against the others. I further held that since the 2nd, 3rd and 4th defendants signed the same guarantee, there could be no dispute that it was a joint contract. Each joint contractor has a right to have his co-contractors joined as parties so that all parties can be before the court. Since final judgment had been entered against the other defendants, the 2nd defendant's contract had merged in the said judgment. Therefore, there remained no cause of action against the 2nd defendant.

Based on this judgment, the plaintiff herein is now making a third attempt to set aside a regularly obtained judgment.

This application is a non-starter. The judgment of the court that the applicant is applying to set aside is dated 16 December 1998. Nearly five years after that judgment, the plaintiff is applying to set it aside based on a judgment, that the plaintiff contends, if referred to the court on 16 December 1998 would have resulted in judgment in his favour.

Firstly, since the plaintiff is applying to set aside a validly obtained judgment almost five years later, the least the plaintiff ought to do is to at least apply for leave of the court since the plaintiff's application to set aside the said judgment ought to have been made within thirty days after receipt of the order by him (see O. 42 r. 13 of the Rules of the High Court 1980).

Secondly, it is against public policy and contrary to the principle that there must be finality to any issue, if this court were to accede to this application. In other words what the plaintiff wants is that each time the law develops, a litigant would be entitled to re-open his case and to re-argue it, either based on the amendment to the earlier law on which the judgment he is applying to set aside is founded, or pursuant to case law. Such an argument is contrary to the principle of finality to justice.

Stretching the argument of the plaintiff, if a person is convicted and sentenced to death on an earlier law and if that law is subsequently amended, what would be the position of an application such as the one before me, if made. Even assuming that a person is sentenced to imprisonment, by applying the law that is subsequently amended which had earlier resulted in the incarceration of the accused, and which law now no longer makes such offence punishable by imprisonment or say, carries a lesser sentence, it is mind-boggling to think of the dire consequences of numerous suits being filed for damages against the Government.

The simple answer to all this is why did not counsel who argued the case in 1998 raise the argument that is the basis of the *Asia Commercial* case. Can the plaintiff then sue his solicitors for negligence in failing to research the law fully? After all if the plaintiff intends to rely on a subsequent judgment that would now vindicate him, surely it can be asked against the plaintiff why he did not diligently research the law and present that similar argument. Since solicitors can themselves be open to suits in negligence, public policy demands that there be finality to an issue.

The plaintiff had exhausted all attempts when he was sued in the earlier case. He had failed to appeal against the decision that he is now attempting to set aside almost five years later. Since the only issue raised by the plaintiff is his reliance on the *Asia Commercial* case, and since that has been dealt with by me, there is therefore no other explanation from the plaintiff herein for this inordinate and extensive delay. On this ground too, this application ought to be dismissed.

Another factor that needs to be considered is that whilst judgment in default of appearance was entered against Ali on 15 May 1997, this plaintiff who was the 2nd defendant in the earlier case resisted the O. 14 application and succeeded in the appeal although judgment was entered for a reduced sum. Surely the plaintiff herein had waived all his further rights by arguing the appeal, without raising this issue he is raising before me today, and by benefiting by his appeal, by having an order for a reduced sum, against which he did not further appeal.

Finally in *Asia Commercial* the case resolved between a borrower and the guarantor. The guarantor is deemed to have waived his common law rights by signing off in the agreement his protective rights. Here both the defendants are partners whose liability to the defendant herein is both joint and several.

As this was an application that was totally unsustainable from inception, I indicated to the respondent's solicitors that there was no need to respond. I therefore dismissed the application with costs.

Perhaps frustrated with the antics of the plaintiff and his solicitors in flogging a dead horse, Mr. Teja urged me to award costs personally against the solicitors for the plaintiff. Much as I was tempted to do so, I declined Mr. Teja's request. But perhaps it is time that the courts begin to show to vexatious litigants or to their over persuasive legal advisers that obviously frivolous and vexatious court proceedings, if rejected by the court, must result in the legal adviser having to personally pay the costs. After all it is open to a solicitor, to refuse a brief if his client refuses to accede to his advice. If a solicitor, lured by the temptation of a fat fee, is prepared to cook up a defence or a claim and fails miserably in the attempt, then it is time, that the solicitor advising, be made to pay the costs. This will reduce unnecessary litigation and surely it must be accepted that judges are endowed with the vision to see through a frivolous case and it must not be held against the court, that by such an approach as is taken by the court, the courts are inhibiting the rights of a litigant to fearlessly pursue his case. However in this particular case, since the plaintiff was relying on a judgment recently delivered and which has not gone through the portals of the Court of Appeal, I refused Mr. Teja's application for costs to be paid by the plaintiff's counsel personally.